Supreme Court of the United States

OCTOBER TERM, 1940

No. .

JONAS WEILL,
Plaintiff,

against

COMPAGNIE GENERALE TRANSATLANTIQUE,
Defendant.

BRIEF IN SUPPORT OF PETITION.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals (R. 59, rehearing denied August 1, 1940) is reported in 113 F. (2d) 720.

Statements as to Facts, Jurisdiction and Errors.

Statements as to the facts of the accident, the jurisdiction of this Court, and the errors relied on, will be found in the petition.

POINT I

The determination of questions of fact is within the exclusive province of the jury safeguarded by the Constitution of the United States.

The determination of facts and inferences therefrom are within the exclusive province of the jury. The court is not

authorized to usurp the functions of that fact-finding body. Such findings by the jury of the facts must be allowed to stand unless all reasonable men's judgment would draw an opposite conclusion from the facts. *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 566, 567, 75 L. ed. 550; *Kinghorn* v. *Pennsylvania R. Co.*, 47 F. (2d) 588. It is the general rule of law in all the courts of this country that the verdict of a jury is not lightly to be set aside, and that when acting reasonably within its province the finding is conclusive.

Furthermore, the effect of setting aside the verdict of a jury, where there is evidence reasonably to support it, is to alter the basic constitutional system of trial by jury (Constitution, VII Amendment), by usurping and arrogating to the court the fundamental and exclusive function of the jury to try and determine the facts.

It is true that a court may direct a verdict for defendant where there is *no* evidence to support a verdict for plaintiff. Where, however, there is undisputed evidence, as in the case at bar, from which fair-minded men will honestly draw different conclusions, the question is one of fact for the jury. *Gunning* v. *Cooley*, 281 U. S. 90, 94, 74 L. ed. 720, 50 S. Ct. 231.

POINT II

There was positive and uncontroverted evidence from which the jury could properly find that the tarpaulin was laid by defendant, in a dangerous condition, with a bulge at its beginning which trapped plaintiff's foot and caused his injury, without his fault.

The sole witness as to the circumstances of the accident was the plaintiff himself. He stated what he saw and what he felt at the time and place of the accident; he produced a deck plan (R. 50, 142) and weather record (R. 85, 148) in

documentary support of his testimony. The record shows without contradiction (see Petition, pp. 2-3) that the day was dull, dismal, cloudy, with no sun; that the deck was covered on three and one-half sides; that the tarpaulin was of a darkish color; that the deck was the promenade deck, which is specifically intended, and provided by the steamship company, for walking upon; that plaintiff came out on said deck from a door on the port side of the vessel near the bow, and he indicated on the deck plan where that door was. He took but a few steps—four or five—in the gloom and half-light of the deck, when he felt that his foot was caught or hooked in a fold of the tarpaulin, and he fell and was hurt; and he saw his foot hooked in the fold. He testified that he was walking at a leisurely pace, as he usually walks, looking ahead of him but not down at his feet. He was not on the alert for traps, nor was he obliged to be, in such a place; he was not entering a place of known danger; and he therefore was not required to walk with his eyes cast down. *Phillips Petroleum Co.* v. *Miller,* 84 F. (2d) 148, 155.

Defendant admitted that it had the tarpaulin there; it was not fastened or guarded. No notice to defendant of the condition of the tarpaulin was necessary, since the condition was one created by defendant itself, or its employees; the negligence arose as soon as the condition was created, and was continuing.

> "The negligence here complained of was that of the defendant itself, committed, it is true, by its employee. It would be an anomaly to hold that one is not to be charged with notice of a condition arising from his own active negligent act, or that there must be proof of knowledge or notice of a dangerous condition created by the negligent act or omission of the owner of the premises. * * * One must be charged with notice of his own act, and, hence, whenever defective conditions are due to the direct act of the defendant, or of persons whose acts are constructively his own, no notice need be shown, but is necessarily implied. *Grzboski* v. *Bernheimer-Leader Stores,* 156 Md. 146, 143 A. 706, 707; *Wine* v. *Newcomb, etc., Co.,* 203

Mich. 445, 169 N. W. 832, 834; *Jones* v. *Pennsylvania Coal, etc., Corp.*, 255 Pa. 339, 99 A. 1008."

Sears Roebuck & Co. v. *Peterson*, 76 F. (2d) 243, 246-7.

See also:

Morrison v. *Hotel Rutledge Co.*, 200 App. Div. 636, 193 N. Y. Supp. 428;

Pittsburgh, C., C. & St. L. R. Co. v. *Rose*, 40 Ind. App. 240, 252.

These are facts established by the record—not surmises or inferences—which the jury was entitled to weigh, and on the basis of which it was entitled to find defendant guilty of negligence, and plaintiff free from contributory negligence. The jury, and the jury alone, had the right to evaluate and judge as to these facts (*Richmond & D. R. Co.* v. *Powers*, 149 U. S. 43, 45, 13 S. Ct. 748, 37 L. ed. 642); and the jury's determination should not have been set aside and reversed by the Circuit Court of Appeals.

POINT III

The failure of the Circuit Court of Appeals to consider the evidence in the light most favorable to plaintiff was error.

In determining a motion by defendant for a directed verdict, the court is obliged to consider the evidence in the light most favorable to plaintiff. *Gunning* v. *Cooley*, 281 U. S. 90, 94, 74 L. ed. 720, 724, 50 S. Ct. 231; *Delk* v. *St. Louis & S. F. R. Co.*, 220 U. S. 580, 31 S. Ct. 617, 55 L. ed. 590; *Crookston Lumber Co.* v. *Boutin*, 149 F. 680, 79 C. C. A. 368, and citations: *William Sebald Brewing Co.* v. *Tompkins*, 221 F. 895, 137 C. C. A. 465 (C. C. A. 6th); *Baskin* v. *Montgomery Ward & Co.*, 104 F. (2d) 531 (C. C. A. 4th). Such a motion may be granted only where "a recovery is impossi-

ble under any view that can properly be taken of the facts." *Dunlap* v. *Northeastern R. R.*, 130 U. S. 649, 9 S. Ct. 647, 32 L. ed. 1058; *Kane* v. *Northern R. Co.*, 128 U. S. 91, 9 S. Ct. 16, 32 L. ed. 339; *Trowbridge* v. *Chandler*, 222 F. 241, 137 C. C. A. 657 (C. C. A. 2d). This is especially true where, as in the case at bar, there is an utter lack of controverting evidence by defendant. *Potts* v. *Pardee*, 220 N. Y. 431, 116 N. E. 78; *Gallup* v. *Rozier*, 172 N. C. 283, 90 S. E. 209.

In this case, the Circuit Court of Appeals not only failed to consider the evidence in the light most favorable to plaintiff; it actually considered the evidence in the light most prejudicial to plaintiff, even going so far as to inject, at its own instance, matter in the form of surmises and conjectures which had no basis in the record, as enumerated hereinbelow.

POINT IV

The opinion of the Circuit Court of Appeals contains several statements consisting of surmises and conjectures prejudicial to plaintiff, which were without foundation in the record.

In its opinion, the Circuit Court of Appeals stated in part:

> "When he had proceeded about 10 feet, *he tripped over the edge* of a tarpaulin which the defendant had spread upon the deck. * * * The tarpaulin was not fastened down, but so far as appears *it may have lain perfectly flat upon the deck.* The plaintiff inferred that there was a bulge which caught his foot, because after his fall his foot was under a bulge in the edge of the tarpaulin. This inference, however, is pure surmise. It is just as probable *that the bulge was created by his stubbing his toe* against the edge of the tarpaulin as he walked *heedlessly* along." (Italics ours.)

The Circuit Court has thus speculated as to the way plaintiff *might have been* injured without fault by defendant.

However, the uncontradicted evidence in the record gives no support to the court's imaginings, but, on the contrary, expressly disproves them. Under these circumstances the Circuit Court had no right to reverse the verdict below.

In *Sears Roebuck & Co.* v. *Peterson*, 76 F. (2d) 243, an action on all fours with this case, brought to recover for personal injuries caused by plaintiff falling on the floor of defendant's store, made dangerous through its negligence, when plaintiff's foot became entangled in some rope or twine lying on the floor, with a loop which caught her foot, defendant appealed from a judgment for plaintiff. The Circuit Court of Appeals for the Eighth Circuit affirmed the judgment below, stating in part as follows (p. 247):

> "As said by us in Terminal R. Ass'n of St. Louis v. Farris, 69 F. (2d) 779, 785: 'The fact that hypotheses incompatible with the liability of the defendant may be conjectured or imagined when such are not based on any testimony in the case, affords no reason to reverse a verdict and judgment which is supported by the testimony.'
>
> "The jury may not base a verdict on mere speculation, but neither should the court indulge in mere speculation as to a possible defense unsupported by any proven facts. The lower court submitted to the jury the question as to whether defendant, or its employees, left the twine in the aisle, and whether this constituted negligence, and we are of the view that it cannot be said that there is no substantial evidence to sustain the verdict on these issues."

See also *Hellyer* v. *Sears Roebuck & Co.*, 67 F. (2d) 584, 62 App. D. C. 318; *Miller* v. *Uvalde Asphalt Paving Co.*, 134 App. Div. 212, 118 N. Y. Supp. 885. The *Miller* case (*supra*) states the position of the New York courts as follows:

> "We think that the jury were justified in determining that it was one of these stones which was struck by plaintiff's foot. While it is true that in order to establish a material fact in a civil action by circumstantial evidence the circumstances must be

such as to lead fairly and reasonably to the conclusion sought to be established, it is not necessary to exclude every other hypothesis that can possibly be suggested. It is enough if it exclude any other hypothesis which can fairly and reasonably be deduced from the evidence. It is certain that plaintiff's foot came in contact with some object extraneous to the car and in close proximity to it. It is possible, as suggested by counsel, that someone may have thrown a stone and struck the plaintiff, or that some careless workman may have left a tool near the track, or that if it was a stone with which plaintiff's foot came in contact it may not have been one of the curbstones above referred to. But there is not the slightest evidence that a stone was thrown, or a tool left near the track, or that there were any loose stones in the street except the curbstones. For the jury to have found that the accident resulted from any such cause would have been to base a verdict upon surmise and conjecture. * * *

"Upon the question of plaintiff's contributory negligence we think also that the question was one for the jury."

In the first place, it was for the jury to determine, when plaintiff came out for a stroll on the promenade deck (which is specifically set aside and provided by defendant for leisurely strolling), whether he was bound to expect traps and dangers, and hence should have kept his eyes fixed on the deck at his feet, or whether he was entitled to assume that the deck was reasonably safe for the purpose for which it was designated, and hence walk with his head up and eyes forward, as he did. Was such conduct on his part "heedless"? It was for the jury, and not the Circuit Court of Appeals, to decide; and the jury decided it was not "heedless" conduct. The Circuit Court of Appeals for the Eighth Circuit has well stated the duty of ordinary care as applied to walking, in *Phillips Petroleum Co.* v. *Miller*, 84 F. (2d) 148, 155:

"He was not entering a place of known danger, nor, indeed, as we have already observed, a strange

> place, but he was entering a place intended for use in the very manner in which he was using it. There was not only a standing invitation to use it, but he had been so using it for some considerable time.
>
> "Even one who walks need not pass through life with his eyes cast down and fixed upon the place for his next step. To be sure, if he must cross a busy street, where the traffic is dense and swift moving, he must be alert and watchful for his own safety; and, if he enters an unknown dark stairway or an unfrequented way, he must do so with extreme caution; but, if his course is upon places intended for his use, with which he is familiar, threatened by no known danger, and having no reason to anticipate that any pitfalls had been placed in his path, he may cast his eyes to the side of the road, to the field, to the hilltops, or even to the skies, without violating the rule requiring ordinary care.
>
> "In *St. Mary's Hospital* v. *Scanlon*, 71 F. (2d) 739, we held in effect that one is not required to guard against that which a reasonably prudent person would not, under the circumstances, anticipate as likely to happen."

In the second place, "so far as appears" *from the record*, the tarpaulin could *not* have lain perfectly flat. Ordinary human experience teaches us that to have his foot "caught" or "hooked" under the tarpaulin, as plaintiff testified, the tarpaulin must have been a few inches off the ground to provide entrance underneath for his foot.

In the third place, it is not probable, as suggested by the Circuit Court of Appeals, that plaintiff stubbed his toe against the edge of the tarpaulin. "Stubbing" would have caused plaintiff to pitch forward, perhaps to his knees or flat upon his face; it is an entirely different sensation from the "hooking", which actually occurred, and to which plaintiff testified (R. 59, 65). In walking naturally, the toe is elevated, and could only "stub" against a solid, elevated object. "Hooking" catches and holds the foot, bringing the weight down upon it, and that is just what happened here. It is not "pure surmise"; it is something plaintiff *knew*

had happened, from the sensation he felt, and from the way he fell, and from the position of his foot, still under the bulge, after the fall. All of this is based upon and consistent with the evidence in the record and consistent with the experience of human beings; on the other hand, the conjecture of the Circuit Court of Appeals as to "stubbing" is entirely without factual support and inconsistent with human experience. The uncontradicted evidence not only supports plaintiff's statement of the bulged condition of the tarpaulin, but also makes impossible the inference of the Circuit Court of Appeals that perhaps no bulge existed. Again, it was for the jury alone to decide whether plaintiff was to be believed; and they decided in the affirmative.

The Circuit Court of Appeals also stated:

> "The defendant was entitled to assume that a passenger walking on the deck in *plain daylight* would see the tarpaulin and step over its edge." (Italics ours.)

This reference to "plain daylight" is unwarranted by the evidence. For one thing, both the weather record and the oral testimony prove that the day was a dull, dismal, cloudy one, with no sun (R. 58, 85, 148). The record shows that there was a solid structure on top, bottom and inner side of the deck, and also halfway up at the rail (R. 56-7). Then, too, the side of the boat where plaintiff walked was the side nearest to the bulky structure of the pier to which the vessel was drawing close (R. 54). The tarpaulin was of a darkish color (R. 93), thus tending to be inconspicuous in the very poor condition of visibility which existed. Thus there was actually no condition of "plain daylight", as stated in the opinion of the court below.

POINT V

The cases cited below by defendant relating to the power of the court to direct a verdict do not apply to this case.

Defendant in his brief on appeal to the Circuit Court of Appeals relied principally upon the cases of *Waters-Pierce Oil Co.* v. *Van Elderen*, 137 F. 557, 70 C. C. A. 255; *Trapnell* v. *City, etc.*, 76 Iowa 746, 39 N. W. 885; *Digelormo* v. *Weil*, 260 N. Y. 192, 183 N. E. 360, and *Moscato* v. *Prince Line, Ltd.*, 164 App. Div. 412, 150 N. Y. Supp. 225.

In the *Van Elderen* case, an action in which plaintiff's injuries were caused by exploding gasoline, the question was as to the source of the leakage which caused the explosion. Against overwhelming proof, by testimony and physical facts, of the Oil Company's theory, plaintiff had only one witness whose testimony, the court held, "so challenges the common sense and experience, as to disentitle it to any consideration whatever" (p. 567). The court held that in such a case, where there was no satisfactory foundation in the evidence for a hypothesis, the jury may not guess; citing *Patton* v. *Texas & Pacific R. Co.*, 179 U. S. 658, 663, 21 S. Ct. 275, 45 L. ed. 361; *Sorenson* v. *Menasha P. & P. Co.*, 56 Wis. 338, 14 N. W. 446, and *Trapnell* v. *City, etc.* (*supra*).

At bar, there was clear, uncontradicted evidence of a plausible nature, not opposed to common sense and experience, supporting plaintiff's claim, and no evidence supporting any other hypothesis; and there is therefore no similarity.

The *Digelormo* and *Moscato* cases (*supra*) were death actions; the fact of death and a defective condition were shown; but no facts connecting the condition with the death were proved; and the court held that under such circumstances a jury may not speculate. These cases, too, are quite different from the case at bar, where there was a clear causal connection, on the record, between defendant's negligence and plaintiff's injury.

POINT VI

The decision of the Circuit Court of Appeals is in conflict with its own previous decisions, applicable decisions of local law, the decisions of the Circuit Court of Appeals for other circuits, and the decisions of the Supreme Court of the United States, and is a departure from the accepted and usual course of judicial proceedings.

The decision of the Circuit Court of Appeals cannot be squared with its prior decisions, in the same circuit, in *Bauman* v. *Black & White Town Taxis Co.*, 263 F. 554; *Compagnie Generale Transatlantique* v. *Bump*, 234 F. 52; *Trowbridge* v. *Chandler*, 222 F. 241, 137 C. C. A. 657; *Mohns* v. *Netherlands-American S. N. Co.*, 182 F. 323, and *Maibrunn* v. *Hamburg-American SS. Co.*, 77 F. (2d) 304.

In the *Bauman* case, an action brought by a pedestrian for injuries inflicted by a taxicab, the court held:

> "Where the facts are such that all reasonable men may not draw the same conclusion from them, then the question is one for the jury. The District Judge was bound to submit the case to the jury, unless a recovery is impossible upon any view that can be properly taken of the facts which the evidence tends to establish" (p. 555).

In the *Bump* case, plaintiff was injured while walking in a passageway upon a ship upon a loose mat or jute runner which slipped when the boat gave a sudden lurch. The court ruled, at page 54:

> "Plaintiff was warranted in assuming * * * that the rugs and mat on the floor would be securely fastened"

and that

> "Whether there was a loose mat, or runner, * * * was a question for the jury,"

and generally ruled that the questions of defendant's negligence and plaintiff's freedom from contributory negligence were for the jury, and affirmed plaintiff's judgment.

In the *Trowbridge* case, defendant was an innkeeper and plaintiff was a guest who sustained injuries from falling down a flight of stairs while going to her bedroom. The Circuit Court of Appeals reversed the judgment which held plaintiff guilty of contributory negligence as a matter of law, holding that the issue of negligence was for the jury to decide.

In the *Mohns* case, plaintiff was injured by the slipping of a loose mat at the head of a stairway on defendant's vessel. Defendant testified that the mat had been made to fit the place where it was used, and defendant thought it did fit, and contended that plaintiff had been caused to fall by a heavy sea. Here again was a question of fact, decided in favor of plaintiff by the trial court, and this same Circuit Court of Appeals affirmed the decision below; and in referring to defendant's contention that the mat had been made to fit and was thought to fit, the Circuit Court of Appeals stated:

> "That is not enough, however, to relieve the steamer from responsibility for the lack of proper appurtenances for the safety of passengers. * * *"

In the *Maibrunn* case, plaintiff was injured when the glass window enclosing the deck broke in a heavy sea. This same Circuit Court of Appeals reversed a judgment dismissing the complaint, ruling that it was for the jury to decide whether or not defendant was negligent in failing to rope off the portion of the deck where plaintiff was injured.

It is also the well-settled rule in the courts of the State of New York, the Circuit Courts of Appeal of the other circuits, and the Supreme Court of the United States, that the question of negligence and contributory negligence, where there is any evidence of negligence, must be determined by the jury; and the decision herein of the Circuit Court of

Appeals is in conflict with these decisions as well as the accepted and usual course of judicial proceedings.

New York Cases:

Kettle v. *Turl*, 162 N. Y. 255, 258, 56 N. E. 626, 7 Ann. Neg. Rep. 482;
Miller v. *Uralde Asphalt Par. Co.*, 134 App. Div. 212, 118 N. Y. Supp. 885.

Cases in Other Circuits:

Sears Roebuck & Co. v. *Peterson*, 76 F. (2d) 243, 247 (C. C. A. 8th);
Wm. Sebald Brewing Co. v. *Tompkins*, 221 F. 895, 137 C. C. A. 465 (6th);
The Korea Maru, 254 F. 397 (C. C. A. 9th);
Chesapeake & O. R. Co. v. *J. Wix & Sons*, 87 F. (2d) 257, 259 (C. C. A. 4th);
Baskin v. *Montgomery Ward & Co.*, 104 (F. (2d) 531 (C. C. A. 4th).

Supreme Court Cases:

Gunning v. *Cooley*, 281 U. S. 90, 94, 50 S. Ct. 231, 74 L. ed. 720;
Richmond & D. R. Co. v. *Powers*, 149 U. S. 43, 45, 37 L. ed. 642, 13 S. Ct. 748, 7 Am. Neg. Cas. 369.
Grand Trunk R. Co. v. *Ives*, 144 U. S. 408, 417, 12 S. Ct. 679, 36 L. ed. 485;
Dunlap v. *Northeastern R. R.*, 130 U. S. 649, 9 S. Ct. 647, 32 L. ed. 1058;
Kane v. *Northern R. Co.*, 128 U. S. 91, 9 S. Ct. 16, 32 L. ed. 339.

CONCLUSION

For the reasons stated in the petition and brief, and to correct an incorrect ruling which, if followed as a precedent, may result in considerably limiting the constitutional right of trial by jury, as well as in establishing a new standard for the proof of a *prima facie* case in negligence actions involving common carriers, generally, and steamship passengers, in particular, it is respectfully submitted that the application for a writ of certiorari should be granted.

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